Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

GREG FORT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 17, 1996

QUESTIONS PRESENTED

Should clear and convincing evidence be required to support a factual determination at sentencing which dramatically increases the sentence mandated by the Federal Sentencing Guidelines?

Where the mandatory minimum sentence for a 22-year old participant in a drug conspiracy is either a 28-year jail term or life imprisonment, and the choice of sentence depends upon whether or not the cocaine distributed by the petitioner included a threshold quantity of "crack" type cocaine, should the district court require clear and convincing evidence that the threshold amount of crack cocaine was involved before imposing a life sentence?

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OPINION BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the indigent petitioner's conviction and sentence of life imprisonment in an opinion reported as *United States v. Evans et al.*, 92 F.3d 540 (7th Cir. 1996) (per Posner, C.J.). The opinion is reprinted in the appendix. (A 1-15).

JURISDICTION

The judgment of the U.S. Court of Appeals was entered on August 9, 1996. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on September 19, 1996. (A 16). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

United States Sentencing Commission, Guidelines Manual, §2D1.1(a)(3) and (c)(3) (Nov. 1993):

(a) Base offense level (Apply the Greatest):

* * * * *

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* * * * *

(c)(3) Base offense level 38

* * * * *

At least 150 KG . . . of Cocaine . . .
At least 1.5 KG . . . of Cocaine Base . . .

* * * * *

STATEMENT OF THE CASE

The petitioner was sentenced to life in prison for participating in a 19-person conspiracy to distribute cocaine and cocaine base (crack cocaine) in Rockford, Illinois. (A 2). The U.S. District Court for the Northern District of Illinois (Western Division) had subject matter jurisdiction under 18 U.S.C. §3231, the case arising from charged

offenses against the laws of the United States, 21 U.S.C. §§ 841, 846.

The petitioner was 20 years old when he was arrested and held without bond pending a jury trial at which he was ultimately found guilty. At sentencing, the district court found the petitioner (then age 22) had been part of the conspiracy's leadership group, which was nicknamed the "Mob." (A 2, 22-26). Another member of the Mob was the petitioner's mother, Helen Fort. (A 2). The district court concluded that, as one of the leaders of the conspiracy, the petitioner was jointly responsible (along with the other Mob members[1]) for the entire volume of cocaine distributed by the conspiracy. (A 26). Accordingly, in order to calculate the petitioner's "base offense level" under the United States Sentencing Guidelines (USSG), §2D1.1(a)(3), the district court estimated the quantity and type of cocaine distributed by the entire conspiracy. (A 26).

Estimating the quantity of drugs distributed by the conspiracy was "not an easy task," according to the district court, because the Government did not seize large quantities of cocaine or crack. (A 26).[2] The district court conse-

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[1] The Court of Appeals' opinion states that there were seven Mob members in the 19-person conspiracy (A 2), but that statement reflects a misunderstanding of the evidence. In fact, there were 11 Mob members in the 19-person conspiracy.

[2] The largest seizure of crack involved 943 grams. There was conflicting evidence regarding whether this crack cocaine belonged to the Mob, and the district court made a point of noting that "by a preponderance of the evidence" the kilo appeared to be a "Mob stash." (A 32).

quently adopted the Government's suggestion to use a "supply side approach" (A 19), and approximated the quantity of cocaine *distributed* by estimating the quantity *purchased* by the conspiracy. The district court estimated that the conspiracy had purchased 23 kilos of cocaine, 19 of which were bought after the conspiracy started selling crack. (A 26-35).

One difficulty with the supply side approach was that it could not distinguish between cocaine that was simply repackaged for distribution, and cocaine that was "cooked" by the conspirators to form crack. The two forms of cocaine are punished far differently: generally speaking, 1 gram of crack cocaine merits the same sentence as 100 grams of powder cocaine. See USSG §2D1.1(c). Accordingly, in sentencing the defendant, the district court relied upon the testimony of two conspirators (Donald Box and Decarles McGhee, who testified pursuant to plea agreements) as the basis for estimating that 50% of the cocaine was cooked and then distributed in the form of crack during the latter stages of the conspiracy. (A 31, 34).

Based on that 50% estimate, the court calculated that the conspiracy had distributed 9½ kilograms of crack (A 35), leading to a base offense level which (after sentencing enhancements) made a sentence of life imprisonment mandatory.[3] (See A 38). Although the district judge then

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[3] The district court calculated a base offense level of 40 in accordance with the Sentencing Guidelines in effect at the time of the October 27, 1994 sentencing hearing. On November 1, 1994, the (continued...)

fulfilled his duty to impose the sentence required by his calculations, he made clear at the sentencing hearing that he thought the sentence was excessive:

> . . . I face having the obligation to impose a life sentence on someone who hasn't killed anybody, who hasn't got a prior felony record, and who hasn't engaged in any criminal convictions that show me that he is a person that normally is one who should spend the rest of his life behind bars. (A 39-40).

Inexplicably, two weeks before defendant's sentencing hearing, the same district court had rejected the testimony of Box and McGhee as a basis for estimating the amount of crack cocaine distributed by the conspiracy. This occurred

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[3](...continued)
Guidelines were changed so that the highest possible base offense level became 38 (a later version of the Guidelines made the change retroactive at the discretion of the trial court). The district court signed the judgment on November 2, and the judgment was entered on November 4. The Court of Appeals held that the date of the sentencing hearing rather than the date of entry of judgment controlled as to which version of the Guidelines was applicable (the Court of Appeals ignored the point that the district court did not sign the judgment until November 2). As a practical matter, however, it does not make any difference for this defendant whether the base offense level is 38 or 40 because, with the six points of sentencing enhancements imposed on the defendant, even a base offense level of 38 leads to a point total (after enhancements) at 44. Life imprisonment is mandatory at 43. Consequently, in this petition, the focus is on the base offense level of 38, because it is at that base offense level that life imprisonment is mandatory.

during the sentencing hearing for Helen Fort. Helen had dropped out of the Mob for a time, but returned to participate in the conspiracy between May 1993 and July 1993. (A 43). In addition to her conviction for conspiracy, Helen was convicted in a separate count of distributing 41 grams of crack. The Government urged the district court to hold Helen responsible for all drugs distributed by the conspiracy in the May-July 1993 period (because she was then once again a Mob member), and to estimate the amount of crack cocaine that was distributed by the conspiracy using the testimony of Box and McGhee. (See A 43). The district court first ruled that Helen should not be held jointly responsible with the other Mob members for the conspiracy's drug volume during that period. (A 45-46). The court then went on to note that, in any event, the testimony of Box and McGhee was insufficient to serve as the basis for estimating the type of cocaine distributed by the conspiracy:

> ...I might say that my ruling in this case, not only would it be difficult for me to compute the amount, other than the 41 grams, but *it would be pure speculation as to whether it's cocaine or crack cocaine*. Box's general testimony was that, well, it was mostly crack cocaine. The testimony of McGhee is, well, we sold both cocaine and crack cocaine. So, those are difficult matters that I may have to face in

> another sentencing... (A 46; emphasis added).

During oral argument before the Court of Appeals, defendant's counsel conceded (notwithstanding the district court's "pure speculation" language) that there was a bare preponderance of the evidence to support the district court's finding as to the petitioner's base offense level, but urged that the finding was not supported by clear and convincing evidence. (A 12). The Court of Appeals agreed the concession was proper, but declined to decide whether clear and convincing evidence was required. *Id.* Although the Court of Appeals offered the rationalization that a different standard of proof may not have made any difference, the appeals court never mentioned the district court's own words (quoted above) which so strongly suggest that a different standard of proof could have made all the difference in the world for this petitioner.

For petitioner, the finding at sentencing that petitioner was responsible for the distribution of 9½ kilos of crack (A 35) condemned him to life in prison. Under the Sentencing Guidelines, if all 23 kilos of purchased cocaine were repackaged, the base offense level would be 34, which would lead (with the six points of enhancement) to a sentencing range of 30 years to life.[4] Even if some of this

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[4] The district court found the petitioner carried a gun during his involvement in the conspiracy (which leads to an additional two sentencing points). The sentencing court also found that petitioner was

(continued...)

purchased cocaine was "cooked" and distributed in the form of crack (as the record supports, because there were some seizures of crack by police), a life sentence is not mandatory unless a threshold quantity of crack (1.5 kilos) is met.[5] A finding that more than this threshold quantity of crack was distributed is the finding that converted a mandatory minimum sentence which would free petitioner when he is 50 years old, into the mandatory sentence of life imprisonment which the district court believed unjust. (See A 39-40).

REASONS FOR GRANTING THE WRIT

I. THIS CASE ILLUSTRATES THE TURMOIL EXISTING BETWEEN AND WITHIN CIRCUITS ON THE FIRST QUESTION PRESENTED

Certiorari is appropriate to resolve a conflict among the circuits on the issue of when, if ever, the standard of proof at sentencing should be clear and convincing evidence rather

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[4](...continued)
a "leader" of a conspiracy, which adds four more points. A base offense level of 34, plus the six added points, gives a point total of 40. The court further found the defendant fell within Criminal History Category III. A level of 40, for a person falling in Criminal History Category III, leads to a sentencing range of 360 months to life under the Sentencing Guidelines.

[5] A quantity of 1.5 kilos of crack translates to a base offense level of 38. Adding the extra six points to this base offense level gives a sentencing total of 44 points. At 43 points, as noted above in footnote 3, life imprisonment is mandatory.

than a mere preponderance. As Justice White observed in dissenting from the denial of certiorari in *Kinder v. United States*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992), this is a matter on which guidance from this Court is warranted.

The uniform view among the Courts of Appeals is that the preponderance of the evidence standard generally satisfies the requirements of due process at sentencing, a view which is in line with controlling precedent, *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 119 L.Ed.2d 214 (1986). *McMillan* left open the possibility, however, that a higher standard of proof might be called for when sentencing findings had an extreme effect on the sentence. See 477 U.S. at 88 ("The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."). To date, the question of whether due process requires the higher standard of proof for any sentencing findings remains "open." *United States v. Patriarca*, 912 F.Supp. 596, 609 (D. Mass. 1995).

The leading post-*McMillan* case is the Third Circuit's decision in *United States v. Kikumura*, 918 F.2d 1084, 1098-1102 (3d Cir. 1990) (Becker, J.), which held that clear and convincing evidence was required by the Due Process Clause to support findings that converted a defendant's sentence from 30 months to 30 years. Two other circuits (the Eighth and Ninth) have likewise suggested that a clear and convincing standard may be appropriate for findings that

have a dramatic effect on the sentence.[6] Another circuit (the Tenth), while rejecting *Kikumura*, admitted that there were "strong arguments" in favor of the higher standard of proof.[7] The decisions of the Third, Eighth and Ninth Circuits are discussed in Justice White's opinion in *Kinder*. See 112 S.Ct. at 2291-92, 119 L.Ed.2d at 215-16.

The Seventh Circuit has taken a position contrary to *Kikumura*. In *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992), the Seventh Circuit criticized the holding of *Kikumura*, saying "it is impossible to square such a holding with *McMillan*." *Id.* More recently, in a case involving an increase in sentence that the court recognized was comparable to the increase in *Kikumura*, the use of the clear and convincing evidence standard was rejected. See *United States v. Rodriguez*, 67 F.3d 1312, 1322-23 (7th Cir. 1995), rehearing denied 73 F.3d 161 (7th Cir. 1996).[8] A petition for rehearing en banc was denied in *Rodriguez*, with five judges dissenting. See 73 F.3d at 161. According to the opinion dissenting from the denial of rehearing en banc, the

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[6] *United States v. Townley*, 929 F.2d 369-70 (8th 1991); *United States v. Restrepo*, 946 F.2d 654, 661 n. 12 (9th 1991) (en banc), cert. denied 503 US --, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992); *Restrepo*, 946 F.2d, at 661-663 (Tang, J., concurring), *id.*, at 664-679 (Norris, J., dissenting).

[7] See *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied --U.S.--, 114 S.Ct. 1404, 128 L.Ed.2d. 76 (1994).

[8] *Rodriguez*, unlike *Masters*, did not absolutely foreclose the theoretical possibility that *Kikumura* might have application in some future case. See 67 F.3d at 1323.

Seventh Circuit should have addressed the "difficult and important question" of whether clear and convincing evidence is required where a finding at sentencing leads to life imprisonment rather than a much shorter prison term. See *id.* at 162-63.

In the present case, the panel reasoned that it should refuse to address that difficult and important question because the petition for rehearing en banc had been declined in *Rodriguez*. (A 12). This refusal had the practical effect of silently following *Masters* and rejecting *Kikumura*. The rift between the Third and Seventh Circuits shows no signs of being resolved in the foreseeable future.[9] The present case thus reflects a circuit conflict, and presents this Court with an opportunity to resolve that conflict.

II. THE ISSUES PRESENTED BY THIS PETITION ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE

As noted by Justice White in *Kinder* -- "[t]he burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings . . ." 112 S.Ct. at 2292, 119 L.Ed.2d at 216. This general importance of the burden of proof to sentencing

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[9] The Third Circuit is continuing to follow *Kikumura*. See *United States v. Seale*, 20 F.3d 1279, 1288-89 (3d Cir. 1994). The Seventh Circuit is continuing its refusal to revisit the issue. See *United States v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996)(panel will not reopen issue which the full court declined to examine in *Rodriguez*).

findings is illustrated by the current furor over the use of acquitted conduct to enhance a defendant's sentence. See generally, *United States v. Baylor*, 97 F.3d 542, 549 (Wald, J., concurring)(characterizing concurring and dissenting opinions on the issue as "bordering on outrage").[10] Another example is the present case, as shown by the district court's comments during the sentencing hearing of petitioner and his mother.

Overlaid against the general importance of the burden of proof at sentencing is the racially disparate impact of the substantial penalty differential between offenses involving crack and powder cocaine.[11] As noted above, there is a 100-1 ratio between the quantity of cocaine which mandates a life sentence, and the quantity of crack which requires that same sentence.[12] An amazing percentage, 88.3%, of crack cocaine offenders are African-American. United States Sentencing Commission, Cocaine and Federal Sentencing

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[10] The furor has its roots in the use of the preponderance standard of proof at sentencing. Under prevailing circuit precedent, a district court may increase the severity of a defendant's sentence for a crime of which he was convicted, by taking into account "relevant conduct" which can include a crime for which the defendant was acquitted. See, e.g., *United States v. Lacey*, 86 F.3d 956, 968 (10th Cir. 1996), cert. denied -U.S.-, 117 S.Ct. 331 (1996)(". . . although certain evidence may not suffice to establish criminal liability under the reasonable doubt standard, that same evidence may nevertheless support a sentence enhancement under the less rigorous preponderance standard").

[11] Petitioner, like his fellow Mob members, is African-American.

[12] The 100-1 ratio also holds true for shorter prison terms.

Policy, (February 1995) at page 156. According to one study, this predominance of black Americans in crack-related crime, coupled with the heavier penalties for those crimes, together constitute the main reason why prison terms for black defendants are longer than for white defendants. *Id.* at 162, quoting U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sentencing in Federal Courts: Does Race Matter? (1993) at 1. See also *id.* at 163 ("The 100-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

Petitioner is not questioning the authority of Congress to establish the 100-1 ratio, nor the authority of Congress to reject the Sentencing Commission's recommendation last year that the 100-1 ratio be abolished. See Federal Sentencing Guidelines Manual (November 1995) at IX. To establish and maintain the 100-1 ratio reflect a policy choice that is the province of the legislative branch.

The judiciary has the authority and responsibility, however, to determine whether individuals hauled into court are subject to the dramatically more severe penalties which result from this policy choice. This responsibility is owed not only to the affected individuals, but also to society at large. The responsibility is especially grave when those severe penalties are being disproportionately imposed on members of a historically disadvantaged minority.

At sentencing, as in any proceeding where a system of justice depends upon human beings, there is a risk that

errors in fact finding will occur. "A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties." *Cooper v. Oklahoma*, -U.S.-, 116 S.Ct. 1373, 134 L.Ed.2d 498, 513 (1996). The preponderance standard allocates the risk of error in roughly equal fashion, reflecting societal indifference to the outcome of the proceeding. See generally *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The Seventh Circuit's approval of the preponderance standard here thus implies an indifference to the possibility that petitioner (and other African-Americans) is being unjustly incarcerated for additional decades because of errors in crack-related factfinding.

McMillan should not be read as requiring such unseemly indifference, and it need not be. At issue in *McMillan* was a statute that established five years as the minimum term of imprisonment for certain felonies if the sentencing court found that the defendant had "visibly possessed a firearm" during the commission of the felony. At issue here is a much more significant finding: the finding by the sentencing court that the requisite amount of crack was involved *added about 20-25 years* (depending on life expectancies) to the term of incarceration. Thus *McMillan*, contrary to the Seventh Circuit's view, need be no impediment to the Third Circuit's conclusion that due process requires clear and convincing evidence for sentencing findings that have a dramatic effect on the sentence imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 1996

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 94-3633, 94-3690, 94-3691,
94-3727, 95-3112

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCUS O. EVANS, SAMUEL TIDWELL,
GREGORY FORT, AND HELEN L. FORT,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Western Division.
No. 93 CR 20024-Philip G. Reinhard, *Judge*.

ARGUED APRIL 10, 1996-DECIDED AUGUST 9, 1996

Nos. 94-3633, 94-3690,
94-3691, 94-3727 & 95-3112

Before POSNER, *Chief Judge*, and CUMMINGS and DIANE P. WOOD, *Circuit Judges*.

POSNER, *Chief Judge*. The four defendants who are the appellants in this court were tried together before a jury for offenses relating to the sale of powder and crack cocaine and were convicted. Three were sentenced to life imprisonment without possibility of parole and the fourth (Helen Fort) to 26 years. We count 29 separate issues and 390 pages of briefs in these appeals, but most of the issues have too little merit to warrant discussion.

The appellants were members of a 19-person drug ring active between 1989 and 1993 in Rockford, Illinois. Seven, including all four appellants, constituted a core group that called itself the "Mob." The core group bought powder cocaine in kilogram quantities and, with the aid of the peripheral members, resold the cocaine, at a rate of approximately two or three kilograms a month, in smaller quantities, often after "cooking" it into crack. Most of the crack was sold in "dime bags," which generally sell for $10 apiece, at crack houses operated by the ring. The peripheral members either worked at the crack houses ("workers") or carried drugs to, and the proceeds of the sales of the drugs from, the crack houses ("runners"). The core group met roughly once a week, made decisions by majority vote, and divided the profits of the ring among the members of the group equally. The group supervised the workers, runners, crack cookers, and other peripheral members of the conspir-

acy, as well as procuring the kilogram quantities of drugs, repacking them in the dime bags, managing the ring's money, and performing other tasks, including some performed regularly by workers and runners.

The core members tended to go about heavily armed -- and not only with the bottle of Dom Perignon that they broke over the head of one of their runners in a dispute about money. They had pistols and assault rifles galore along with bulletproof vests, and they shot and were shot, though no fatalities are mentioned. A search of defendant Tidwell's residence turned up four loaded guns, and he was convicted, along with drug trafficking, of using or carrying a firearm during and in relation to a drug offense, in violation of 18 U.S.C. § 924(c). There was no evidence that he "used" any of his guns in the new sense of "use" that the Supreme Court impressed upon the statute in *Bailey v. United States*, 116 S. Ct. 501 (1995). That is, there is no evidence that he made any active use of these guns; they may, so far as the evidence shows, have been purely for protection. All this is irrelevant. There is no objection to the instruction, which did not attempt to define the terms "use" or "carry," and plenty of evidence that Fort "carried" guns within the meaning of the statute, even if he didn't "use" them within that meaning. If a jury is directed to convict if it finds either *x* or *y* (here, either use or carriage), and there is no evidence of *x* but plenty of *y*, and it convicts, the conviction will stand despite the absence of evidence of

x. *Griffin v. United States*, 502 U.S. 46, 59 (1991); *United States v. Briscoe*, 65 F.3d 576, 584 n. 9 (7th Cir. 1995). The jury is assumed to have found the facts in accordance with the evidence. Tidwell is therefore not entitled to a new trial on the charge that he violated section 924(c).

The issue pressed hardest by defendant Helen Fort is whether she was placed in double jeopardy by the forfeiture of some $28,000 in personal property (weapons, jewelry, and a bank account) that the FBI seized when she was arrested. The question whether a civil forfeiture proceeding is punishment within the meaning of the Eighth Amendment has now been answered "no" by the Supreme Court. *United States v. Ursery*, 116 S. Ct. 2135 (1996). But the claim was frivolous from the start because while there was a seizure, ripening into an administrative forfeiture, there was no judicial forfeiture. *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994); *United States v. Idowu*, 74 F.3d 387, 394-96 (2d Cir. 1996). A seizure turns into a judicial forfeiture when the person whose property has been seized takes the proper steps to get it returned yet fails, so that he loses the property as the result of a judgment. If he fails to take these steps, no judgment is entered (so no jeopardy attaches) and the property is treated as abandoned; this is administrative forfeiture.

Concretely, when a federal law enforcement agency seizes property that the person it is seized from would like to get back, the person must file a claim with the agency, in

this case the FBI, and either post a bond (normally 10 percent of the value of the property seized) to cover the agency's costs of storage and maintenance of the property or persuade the agency to allow the claimant to proceed in forma pauperis, without having to post a bond. 19 U.S.C. § 1608; 21 U.S.C. § 881(d); 19 C.F.R. § 162.47(e); *Linarez v. U.S. Dept. of Justice*, 2 F.3d 208, 210 (7th Cir. 1993). If pauper status is denied, the claimant can either post the bond or challenge the denial by filing an action in federal district court to set aside the denial as "arbitrary" or "capricious" within the meaning of the Administrative Procedure Act. 5 U.S.C. §§ 704, 706(2)(a); see *Jones v. DEA*, 801 F. Supp. 15, 24 (M.D. Tenn. 1992); *Application of Williams*, 628 F. Supp. 171, 173 (E.D.N.Y. 1986). The waiver of the bond is mandatory if the claimant is in fact a pauper, 19 C.F.R. § 162.47(e), and it would be anomalous if the government could pauperize you by seizing all your property and then prevent you from challenging the seizure by denying you pauper status, thus requiring you to post a bond with money that you don't have. Once the bond is posted or pauper's status granted, the administrative claim is perfected and if the agency wants to keep the property it must seek a court order of forfeiture. 19 U.S.C. § 1608; 21 C.F.R. § 1316.78; *Linarez v. U.S. Dept. of Justice, supra*, 2 F.3d at 210. That is judicial forfeiture. No order was sought here because Helen Fort was denied pauper status, did not challenge the denial though represented by counsel,

and did not post a bond. She thus abandoned the property -- or perhaps had never had any interest in it.

Gregory Fort complains about the seizure of drugs from the trunk of his car. One of the gang's crack houses was a two-family house at 1433 Mulberry Street in Rockford. Upon an ample showing of probable cause to believe that it was indeed a crack house and that Gregory Fort resided there, at least intermittently, the police obtained a warrant to search the house "with detached garage." When they executed the warrant the police found a car parked in the garage, searched it, and found several packages of powder and crack cocaine in the trunk. The car belonged to Gregory Fort, who argues that the police should have gotten another warrant before searching the car. Our review of this issue has been hampered by the absence of the warrant from the record. All we have are some excerpts submitted by the prosecutor. The appellant did not include the warrant in the appellate record, so is deemed to acknowledge the accuracy and representativeness of the excerpts.

United States v. Percival, 756 F.2d 600, 612-13 (7th Cir. 1985), holds that a warrant to search a residence and attached garage authorizes the search of a car found in the garage. We do not understand Fort to be challenging the soundness of that decision or to be making anything of the difference between an attached and a detached garage. But he points out that Percival was (or at least so our opinion assumed) the owner of the house and garage searched there,

and he urges us to confine the holding of the *Percival* case to owners. We cannot think of any reason for distinguishing between an owner and a tenant, or for that matter between an owner or tenant on the one hand and a sublessee or intermittent occupant -- either of which terms may be a more apt description of Fort's position at 1433 Mulberry Street -- on the other hand. The police knew it was a crack house that Fort, whom they had reason to believe was involved in the drug trade, frequented and in which he sometimes resided. It was reasonable for them to suppose that his use of the property might extend to the garage, since he had been seen driving in the vicinity of 1433 Mulberry Street, and that either the house or the garage might contain contraband or evidence of crime.

A warrant to search a house or other building authorizes the police to search any closet, container, or other closed compartment in the building that is large enough to contain the contraband or evidence that they are looking for. *Id.* at 612; *United States v. Ross*, 456 U.S. 798, 820-21 (1982); *United States v. Griffin*, 827 F.2d 1108, 1114-15 (7th Cir. 1987); *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987). If they are looking for a canary's corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less.

It seems to us that a car parked in a garage is just another interior container, like a closet or a desk. If, as in this case, the trunk or glove compartment is not too small to hold what the search warrant authorizes the police to look for, they can search the trunk and the glove compartment. That, we think, is the holding of *Percival*; it is not tied to ownership. Decisions of the other circuits are in accord. *United States v. Vaandering*, 50 F.3d 696, 701 (9th Cir. 1995); *United States v. Sturmoski*, 971 F.2d 452, 458 (10th Cir. 1992); *United States v. Singer*, 970 F.2d 1414, 1417-18 (5th Cir. 1992).

Although the police happened to know that the car they were searching was Fort's, it does not matter whose it is unless it obviously belonged to someone wholly uninvolved in the criminal activities going on in the house. If an innocent guest leaves a trunk in his host's house and the police obtain a search warrant to search the house for something small enough to fit in the trunk, then, unless it is apparent that the trunk does not belong to anyone connected with the illegal activity -- a condition that will rarely be satisfied -- the police can search the trunk and if it happens to contain evidence that the guest is a criminal after all, albeit innocent of any involvement in the criminal activities of his host, he is out of luck. We thus agree with *United States v. Giwa*, 831 F.2d 538, 543-45 (5th Cir. 1987), which rejected an automatic defense for "casual visitors."

The case is no different if the trunk is the trunk of an automobile that an overnight guest has parked in his host's garage. *United States v. Motz*, 936 F.2d 1021, 1025 (9th Cir. 1991). It is relatively uncommon, however, for someone to park his car in a garage attached to or associated with a private residence, as opposed to a public garage or a garage in an apartment house. The rule of *Percival* does not extend to these other garages. Having a warrant to search a person's apartment "and garage" does not entitle the police to search every car in the garage of the apartment house. *United States v. Stanley*, 597 F.2d 866, 870 (4th Cir. 1979); see 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.10(c), pp. 668-69 (3d ed. 1996).

We turn to the sentencing issues, which also mainly involve Gregory Fort. A very curious issue is the date on which he was sentenced. Amendments to the federal sentencing guidelines that went into effect on November 1, 1993, lowered the base offense level for offenses involving crack; and had the amendments applied to defendants Tidwell and Gregory Fort their sentences might have been shorter. The judge pronounced sentence on them on October 27 (Fort) and 28 (Tidwell), and he based these sentences on the guidelines in effect on those days. But the judgments were not entered by the clerk of the district court on the docket sheet until November 4. Fort argues that the sentence was not imposed until the judgment was entered, and Tidwell that his lawyer was guilty of ineffective assis-

tance in failing to ask the judge to delay the sentencing beyond November 1. Tidwell's argument gives us little pause, as he does not suggest any ground that his lawyer might have had for asking the judge for a delay. If the shoe were on the other foot, and delay in sentencing would result in a higher sentence, we do not think that Tidwell would acknowledge the right of the prosecutor to move for a delay in sentencing without any better ground than wanting to have a different sentence. Criminal defense lawyers, like other lawyers, do not have an ethical duty to make groundless arguments; indeed, they have an ethical duty not to make such arguments. *United States v. Gomez*, 24 F.3d 924, 926 (7th Cir. 1994); *United States v. Sanchez-Estrada,* 62 F.3d 981, 986 n. 11 (7th Cir. 1995); *United States v. Rivera*, 68 F.3d 5, 8 (1st Cir. 1995). The refusal to act unethically by making a groundless argument can never be a ground for arguing ineffective assistance of counsel.

As for Fort's argument, the statute requires the judge to apply (to the extent the ex post facto clause permits) the sentencing guidelines "that are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A). The term "sentencing" in legal as in ordinary language refers to the pronouncing of sentence by the judge in open court, rather than to the subsequent recording of the sentence on a docket sheet. This understanding is confirmed by the federal sentencing statute, which requires the district court, "at the time of sentencing," to state in open court the

reasons for "its imposition of the particular sentence." 18 U.S.C. § 3553(c). If Fort and Tidwell were right, the required statement of reasons would come before, rather than at the time of, sentencing, contrary to the statute. More important, the judge, when pronouncing sentence shortly before the effective date of a change in the guidelines, would not be certain which guidelines to proceed under because he would not know exactly when the clerk would enter the judgment on the docket sheet.

It is true that for purposes of appeals and corrections of sentence the critical date is the date of the entry of judgment rather than the date on which the sentence is pronounced. *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994). Fed. R. App. P. 4(b) is explicit that the time for taking a criminal appeal runs from the date of "the entry either of the judgment or order appealed from." And while Rule 35(c) (correction of sentence by sentencing judge) is inexplicit ("7 days after the imposition of sentence"), the court in *Clay* thought that the practice under Rule 35(c) should be conformed to the practice in taking an appeal because correcting a sentence serves a similar purpose, that of revising the judgment. A Rule 35(c) correction tolls the time for appealing. *United States v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993); *United States v. Marillo*, 8 F.3d 864, 868-69 (1st Cir. 1993). It would be pretty confusing if the time for making the correction ran from the time of the pronouncing of sentence even though the time for appealing did not start

to run until the entry of the judgment. No such confusion results from interpreting "the date the defendant is sentenced" in 18 U.S.C. § 3553(a)(4)(A) as the date on which sentence is pronounced in open court.

The district judge found that at least half the cocaine sold by the defendants in the final period of the conspiracy was crack. This finding had a big impact on the defendants' sentences, because the sale of crack is punished much more heavily than the sale of powder cocaine. U.S.S.G. § 2D1.1(c). The judge based his finding on testimony by a turncoat member of the core group that during the relevant period the "majority" of the cocaine sold by the conspiracy was in the form of crack. The testimony was believable and believed, and was corroborated by a variety of other evidence. At argument Gregory Fort's lawyer conceded that the judge's finding was supported by a preponderance of the evidence but urged us to lay down a rule that quantity findings that have a large impact on sentence must be supported by clear and convincing evidence. It is doubtful that the rule would make a difference in this case, because the judge pronounced himself confident that during the relevant period the conspiracy sold at least half its cocaine in crack form. But in any event a majority of the full court declined recently to examine the issue, *United States v. Rodriguez*, 73 F.3d 161 (7th Cir. 1996), and it would be inappropriate for this panel to attempt to reopen it.

The last issue we need discuss is whether Gregory Fort's sentence was rightly enhanced on the ground that he was a "leader" of the conspiracy. A leader of a criminal activity or enterprise that has five or more participants receives a four-level bump-up in sentence. U.S.S.G. § 3131.1(a). Fort argues that as a latecomer to the "Mob" (the core group of the conspiracy, remember), he could not be regarded as the leader, and also that he was not shown to have supervised at least five members of the peripheral group of conspirators that consisted of workers, runners, crack cookers, and security guards.

The guideline does not exclude the concept of collective leadership. The Rockford drug ring was managed by a seven-member "board of directors" that included Gregory Fort. The commitment of this board to majority vote gave each member, including Fort, a position of authority tantamount to leadership, as is further shown by the fact that the members split the profits of the conspiracy equally among themselves. The fact that fewer than five members of the peripheral group actually reported to Fort is immaterial. *United States v. McGuire*, 957 F.2d 310, 316-17 (7th Cir. 1992). Individual employees of a corporation generally do not report to individual members of the board of directors; nevertheless the board is the corporation's collective leadership.

The judge had an alternative ground for sticking Fort with the four-level enhancement for leadership. Section

3B1.1(a) applies to defendants who are leaders of a criminal enterprise or activity that has five or more participants or is "otherwise extensive." The judge thought that even if Fort did not "lead" five or more participants in the conspiracy, the conspiracy had so many more than five participants (19, remember) that it must have been otherwise extensive. The word "otherwise" suggests, however, as do the cases, *United States v. Randy*, 81 F.3d 65, 68-69 (7th Cir. 1996); *United States v. Briscoe*, *supra*, 65 F.3d at 590 and n. 17, that the reference to "extensive" activity is to an activity that is extensive even though it has fewer than five participants, or at least fewer than five criminally liable participants. So a Fagan-type gang, which employs children too young to be charged with crime, or a small gang that operates through persons who are mere unknowing instruments, or perhaps a gang that while small uses modem computer and communications technology to extend its tentacles worldwide, could be thought "*otherwise* extensive." This is a matter that the Sentencing Commission would be well advised to clarify, but it does not affect the sentences of these defendants, since it was merely an alternative ground.

The other issues require no discussion. By filing separate briefs, even though there is no conflict among the defendants' positions, and by briefing every conceivable issue plus the kitchen sink, the defendants' lawyers both enabled the government to play divide-and-conquer in its brief and argument (both superb) and deprived their appeals

of focus. Nevertheless we have tried conscientiously to examine all the issues and to discuss all those -- few -- that have at least arguable merit. We find no error, with the possible but irrelevant exception of the district judge's interpretation of "otherwise extensive."

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 1996
Before

Hon. RICHARD A. POSNER, Chief Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Northern District of Illinois,
No. 94-3691 v.	)	Western Division.
GREG FORT, also known as G MONEY, also known as G, Defendant-Appellant.	)	No. 93 CR 20024 Philip G. Reinhard, Judge.

ORDER

On August 23, 1996, defendant-appellant Greg Fort filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
	)	
Plaintiff,	)	Rockford, Illinois
	)	Thursday,
v.	)	October 27, 1994
	)	9:00 o'clock a.m.
GREGORY FORT,	)	
	)	
Defendant.	)	

EXCERPTS FROM
TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

For the Government:	HON. JAMES B. BURNS United States Attorney (211 South Court Street, Rockford, Illinois 61101) by MR. JAMES T. ZUBA MR. JOHN G. MC KENZIE Assistant U.S. Attorneys
For the Defendant Gregory Fort:	MR. DANIEL KING (401 West State Street, Suite 201, Rockford, Illinois 61101)
Also Present:	MS. TERESA BROWN Probation Office
Court Reporter:	Mary T. Lindbloom 211 South Court Street Rockford, Illinois 61101 (815) 987-4486

* * * * *

be obtained in June of 1992, but they were interdicted in Missouri. Of course, the court is aware that that's corroborated, that three kilograms were, in fact, seized in Missouri, and that another load of cocaine was attempted to be brought up, but it was seized around Mother's Day around May of 1992. It was seized at Union Station. And, again, the court is aware that that was corroborated.

THE COURT: What was that amount?

MR. MC KENZIE: Well, almost three kilograms, I believe, were brought up; although, Mr. Box's testimony was that only one was going to the Mob. So, I've only included one kilogram for the Mob on that; although, I believe Mr. Box may have been mistaken on the amount, but we only have one kilogram for that.

THE COURT: But three were seized. Was that not the case?

MR. MC KENZIE: That's correct. So, you come up with ten kilograms that were not used in the court's findings or at least were discarded in the court's findings on Marcus Evans' sentencing.

Now, continuing on a supply side approach, your Honor, we have two kilograms that were obtained by Mr. Box in 1992 from Ilander Willis, also known as Pimp. Those kilograms were bad, and they were later turned back in. But, again, you use the amount that was attempted to be purchased, if an attempt

* * * * * *

MR. ZUBA: No, I don't believe he did, Judge.

THE COURT: Well, no. I read it over the noon hour. Mr. King did ask the question.

MR. KING: I did. I have it marked in my -- (Off-the-record discussion between Mr. Zuba and Mr. McKenzie.)

MR. ZUBA: I'm sorry. We have miscommunication.

THE COURT: All right. I did read it, and Mr. King did cross-examine him on the failure to name him in those reports, and somebody -- it was either Mr. Zuba or Mr. McKenzie or whoever the attorney was on redirect -- I think it was Mr. Zuba -- asked him something to the effect he didn't list him to the FBI, and he said, "Well, I didn't know precisely when he joined because he got out of the Service," or something like that. It was an answer.

THE COURT: All right. The court is ready to rule on the issues that are presently before me as it relates to the Sentencing Guideline calculations. And I would first say that both sides, the government and the defense, have very ably honed in on the issues that relate to the base offense level, that is, the leadership and the quantities. And the leadership role is very crucial because if Greg Fort is a leader, he would be -- as I'll later look at, he would be responsible for quantities of the other members of the conspiracy, if they were reasonably foreseeable and in furtherance of the conspiracy. And this is also critical, my decision as to whether he's a leader, because the penalty is so severe, if, in fact, he is a leader. On the other hand, I

must judge it based upon not looking at the ultimate penalty at this time, but looking at whether he is, in fact, a leader or he wasn't a leader.

And I agree with Mr. King to the extent that the scope of the criminal activity for which he is alleged to be a member must be carefully scrutinized, and it is -- what I'm looking at, as far as the scope of the criminal activity, is the activities of this conspiracy from a period in August of 1991, when he supposedly became a leader, until July 28th, 1993, when the conspiracy ended with the arrest of the persons who were ultimately charged.

And the conspiracy, as I view it, is one in which it is alleged and has been proven in court that various people got together and decided to obtain and sell drugs, both cocaine and crack cocaine, in this community from at least August of 1991 -- actually, there's testimony that Box gave that it began, at least as far as his involvement, in approximately April of 1991. And there's extensive testimony, there's extensive exhibits, there's extensive tapes, both of wire intercepts and body recorders, that I think very clearly show that there is a conspiracy to buy and distribute those drugs which I mentioned in this community, and it was organized, and it was such that they had leaders.

They had leaders that split the profits, that contributed to become a leader, and they obtained cocaine from various sources, and, further, that they engaged in a system of organization in which persons were leaders, then they had runners, and then the runners put the supplies out to the workers. That further in this scope of the criminal conspira-

cy, they used weapons to protect themselves. They kept discipline among their group by keeping track of their runners and workers, and they became members of the Gangster Disciples or were members of the Gangster Disciples, and that helped keep them in line.

But the critical finding then becomes -- because I've now defined what the conspiracy is and the scope of that conspiracy -- did the Defendant Gregory Fort become a member of the conspiracy and a leader of the conspiracy. The testimony of Donald Box is that the defendant became a member of the leadership group, the core, if you want to call it that, in August of 1991 and continued in that role until July 28th, 1993. Box's testimony is subject to impeachment for the reasons that Mr. King brought out, specifically the fact that Greg Fort was not mentioned as a leader in Box's conversations with government agents at the time the proffer was initiated, and that is critical to some extent in judging the credibility of Box.

There are other instances where Box's testimony had been subject to some close scrutiny by the court, and I will say this overall, that generally I will credit Box's testimony because I think it has been corroborated in large extent, and there's some instances where I do not credit it. It doesn't mean that I disbelieve it. It simply means that I'm not going to credit it because it's not subject to corroboration, but generally his testimony about the organization, the distribution, the sources, the discipline, the weapons, and the way the conspiracy operated, I credit that testimony.

As it relates to the Defendant Greg Fort being a leader, he says that Fort's a leader, and he describes what the various leaders did, and I want to make it clear that in terms of the leaders, whether Greg Fort is determined to be a leader or not, I believe that the core group are all leaders. The core group would vote by majority vote. They would meet. They would decide upon the purchases to be made, how to operate. They employed runners and workers, and they made decisions as to who would be in the group and who would be out of the group, and I have no question in my mind that there was a leadership group as basically testified to by Box.

Box's testimony as it relates to Gregory Fort is subject to impeachment on the basis that he didn't name Fort in his early conversations with the government, and were I to have only that evidence of Box as to Greg Fort's leadership role, I would tend to find that he was not a member of the leadership group. But I've looked carefully at whether there is corroborating evidence, and first I have looked at and reread the testimony of Purvis, and Purvis says that Antonio Craig told him that Greg Fort was one of the leadership people.

Secondly, from mid-1992 until 1993 and into 1993, Purvis was a runner, and he says that he picked up packs from the defendant and that while he was a runner, they would pick up packs from the leaders. Secondly, he bagged rock cocaine at the defendant's residence on Mulberry. Third, the defendant gave him directions as to how to work

off certain money that was seized when Purvis was arrested in the January 28th, 1993, arrest.

Next, defendant gave the workers and runners directions in January of 1993 at a meeting and that when he, Purvis, was called and questioned by members of the leadership group as to disciplining him, the defendant was one of those persons who was present and asked him questions and participated in the session whereby he was disciplined and eventually wound up getting hit over the head by Joe Tidwell.

The court further finds corroboration in the fact of Decarles McGhee's testimony about defendant's role, and McGhee became a member of the conspiracy, but not a member of the inner group. Like Purvis, he was not a member of the inner group. And McGhee became a member in mid-1992. He names in the court -- named the defendant as one of the Mob who distributed packs and collected money from him, that he turned in packs to the leaders, and that he, McGhee, was a runner. He received packs and turned in moneys from the defendant at his home and that the defendant was present when crack was bagged, and that was done by the leadership.

Further, that in corroboration of McGhee and Purvis, there is some evidence on the tape that shows that the defendant is giving directions and active like a leader; although, the tapes are mostly as to other defendants.

I credit the testimony of McGhee and Purvis because it corroborates Box, and now I must determine whether Box's testimony and Jones' testimony, another witness, is discred-

ited by the testimony of -- or the exhibits that have been offered at this sentencing hearing. The court has examined those two affidavits, one by Mr. Copeland and one by Mr. Roberts. The court finds them to be suspect because they are by prisoners who have not had any connection with this case. They are prisoners at the MCC. I don't know anything more about them. And they attribute certain conduct to and motives to Donald Box and to Melvin Jones, but at this time under these circumstances, I'm not going to give any weight to that.

That doesn't mean at some later point I could give weight to it if it's a matter of new trial, where I hear these persons testify, if necessary, or when I consider other evidence that may support or corroborate that. But as yet, they appear to be -- at least for the purpose of hearing, they are statements by fellow prisoners, and I think they're highly suspect coming at this late period of time. They could have been given earlier. If these people were interested in assisting this court or the government in some way, they could have been disclosed earlier through their attorneys. They, in fact, are disclosed after a guilty verdict. So, I will have an opportunity to look at these again if there's a motion for new trial, but I do not give them any weight at this time.

I further, as another example of perhaps the defendant was a leader and this is fairly weak, but it's one more bit of evidence is that on the Jamaica trip, the defendant is one of those who took part in that trip, and which consisted of leaders of this organization.

The court finally will say that as a leader then, he, Greg Fort, could reasonably foresee the acts of other leaders and runners and workers in the conspiracy to distribute cocaine and crack cocaine, and that that was -- the scope of the conspiracy was to do exactly that, distribute cocaine and crack cocaine in this community.

The court will, therefore, make the finding that the defendant is a leader based upon his role. There may be some other persons, like his mother and like his uncle and like Sam Tidwell and maybe others, who might have been in it longer, others who might have been more influential in the sense of being older. And it's a sad thing that this defendant is only 22 years old and is a part of a conspiracy as a leader, but the court finds that under the evidence he has joined in with the others to make the crucial decisions as to how this conspiracy would operate, and he's done that and has become a part of the leadership.

Therefore, I'm now going to calculate the amount of cocaine and cocaine base that ought to be attributable to him, keeping in mind that amounts may also be attributed to him not just as an individual, but as responsible under foreseeable acts by others that were in furtherance of the conspiracy and the objective of the conspiracy. And the court recognizes it has a duty to make special findings regarding the amount of drugs attributable to the defendant. This is not an easy task, as both lawyers have pointed out. There have not been large quantities of cocaine or cocaine base seized at the time, but the court must look at the

evidence and evaluate it and determine the amounts to the best of its ability.

Since the defendant -- I find the defendant joined the leadership role in the conspiracy beginning in about -- I'm going to make it about September of 1991. Even though it's testified that he joined in approximately August of 1991, I'm going to begin my analysis as of September 1991. There is testimony that for a period of four months or thereabouts -- September, October, November, and December -- that the group was purchasing two to three kilos of powder cocaine through Helen Fort and that it was about two or three kilos per month.

During that four-month period then, the court will take the lower of those figures and take the figure at two kilos per month, and the court will then look at the evidence. Is there anything to corroborate Box's testimony as to why I ought to credit it at eight kilos that he says or credit it at zero kilos or calculate it at somewhere in between. The only corroboration that I can find is Purvis' testimony as to the activities, and he does testify somewhat during that period of time; although, he is on the East Side. So, at least it corroborates it in some extent that they were -- there was an organization that his boss at that time, Antonio Craig, was getting it from, and at least it shows that there was an organization that was distributing cocaine at that time.

There is some evidence that earlier -- to corroborate Box -- earlier one of the houses at 411 South Independence was raided, and a small quantity of cocaine was found at that time, and although that is before the defendant joined

the conspiracy and became a leader, it does show that corroborate that this group was operating at that time.

There also is some subsequent -- there are events subsequent to this September through December time to indicate that there was an organization in operation. There's some evidence that there was a stop of Sam Tidwell and -- I think it was Montie Russell -- in March of 1992 in which $1400 in cash was found on them, which is indicative -- a large amount of cash is indicative of drug trafficking, along with all the other circumstances. That just shows, again, that they were an operation.

I have taken, therefore, the figure eight kilos, and there is some corroboration, and I have in one of the prior cases found that I will attribute 50 percent of that amount to be credible evidence of the cocaine distribution. Instead of eight kilos, I've taken four kilos. And, as I say, the alternatives are either to accept all the eight or reject all the eight, and I don't think that's logical. What I have done is tried to reach a figure that is conservative. Yet I feel there's an organization. I feel that it's been shown amounts have been distributed. Box's testimony is credible, I find, as to four kilos of cocaine from that period of time.

Then the court has considered evidence as to since that period of time where they got further quantities. The court has considered the testimony of Box that in the spring and summer of 1992, purchases of a kilo in powder form were made from a person by the name of Ollison from Texas, and I am using the purchase method of calculating the amount, and testimony about distribution by Box, Purvis, and

McGhee assists the court in arriving at calculations as it relates to purchases. As far as I'm concerned, it's an easier computation for this court, at least, to look at the purchase end of it; although, I have considered the distribution end, the testimony of that, in corroborating purchases.

The testimony is that in the spring and summer of 1992, Box says that Sam Tidwell bought one kilo from Ollison and that he, Box, bought three kilos and that Wintersmith and Willie Tidwell bought three kilos. That would be a total of seven kilos. And Box actually testified that seven to nine kilos were obtained. I, first of all, will take that lower figure. But is there corroboration of that lower figure? There is.

First of all, there's corroboration on the basis of the stop and eventual arrest and prosecution of two defendants that are not involved in this case, but, as I recall, they were charged in another jurisdiction, and that's Willie Tidwell and I think it's Willie Johnson. And at the time they were arrested in Scott City, Missouri -- and I believe that's in June of 1992 -- Box testified they were bringing back three kilos from Ollison. There is testimony from arresting officers that they seized three kilos from Tidwell and Johnson in Scott City, Missouri. So, that corroborates the fact that there was quantities being bought from Ollison.

In addition to that, the defendant -- or Box himself is stopped on March 15, 1992, in -- I believe it's Missouri. Maybe it was Arkansas. I'm not sure. And at that time he's stopped carrying $5,000 in cash. That amount carried

in cash corroborates the fact, in my opinion, that he was involved in the drug operation.

In addition, the court would find further evidence of corroboration that large amounts were being purchased from Ollison, that there was a seizure in Chicago of three kilos from a person who was identified as Ollison, and Box said that one kilo was earmarked for them, meaning the group in Rockford. I think that's credible.

The court further finds that there is evidence that members of the leadership group attempted to bond out persons who had been arrested. They attempted to bond out Willie Johnson and Willie Tidwell, and there's testimony of that. There's testimony of large amounts of money to be posted for bond money, which later went to attorneys. Again, this shows the magnitude of the organization and how it was operating at that time.

Finally, as to the seven to nine kilos that Box says were obtained from Ollison during that period of time, there's testimony of both Purvis and McGhee as to the extent of the cocaine that was being distributed in the Rockford area and how it was being sold. And so, that corroborates the fact that there was a large amount being obtained.

The court will make the following finding then as to amounts from Ollison. I will find that there are seven kilos that can be attributed to Ollison as actually coming to the organization. I will credit the three that Box brought in, one that Tidwell brought in, and three that Wintersmith and Willie Tidwell brought in. I'm sorry. I wanted to say one that Sam Tidwell brought in, three that Box brought in, and

three that Willie Tidwell and Wintersmith brought in. So, that's seven kilos.

I also believe under the evidence that -- and I hadn't calculated this before in one of the other cases, but as addressed to this case, the one kilo that was seized in Chicago and the three kilos that were seized at the time that Willie Tidwell and Willie Johnson were arrested, that's attributable to this group. It was reasonably foreseeable, like the others. And, therefore, it's a total of eleven kilos from the Ollison person that I will attribute to the organization, and I therefore, through the organization, find that the defendant, as a leader, reasonably foresaw this, and it was in furtherance of the conspiracy.

I'm going to find under the evidence that 50 percent of this will be attributed to crack cocaine and 50 percent to cocaine. I make that finding on the basis of Box's testimony as to when crack was being distributed and when cocaine was being distributed and McGhee's testimony that he sold both and then Purvis' testimony, as well, and I'm splitting it at a 50/50 level because McGhee said they sold both. Box said the majority was crack, but I don't know how much a majority is. Therefore, I'm attributing five and a half kilos to crack and five and a half kilos to cocaine.

This takes us up to the summer of 1992 or into the summer of 1992 and the balance of the summer of 1992 through July 28th, 1993. Box testifies that he purchased from -- first, from Ilander Willis. Again, can I credit Box's testimony? Well, he says he got two kilos from Willis in the summer of 1992 and then six or seven more kilos in

1993. As to those amounts, there is corroboration somewhat on the tapes that at least they were dealing with Willis during that period of time, and further there's corroboration that this group and the entire conspiracy was distributing during that period of time because -- not only the testimony of Box, but, first of all, one kilo of crack cocaine was seized on May 28th, 1993. That was from Gloria Holmes, house, and she is tied into the group as the girlfriend of Montie Russell at that time.

Box testified that he had been over there with Montie Russell where it had been stashed, and even though there's some evidence that he later said, "I didn't know specifically whether that was Mob cocaine or not," I attribute that to be whether when he first heard of the arrest or the seizure, whether he didn't know specifically whether that was Mob cocaine. But under the evidence it appears to this court that -- and there's some tapes, at least one tape, where Holmes is talking to Montie Russell, who I find was a part of this organization, about the fact the police were in there now looking and searching for it.

I think there's a sufficient tie-in by a preponderance of the evidence that this kilo was Mob stash, as far as crack cocaine is concerned, and by a preponderance of the evidence, it shows me that this verifies what Box has been saying of the wide distribution of crack cocaine during that period of time. If you can keep a whole kilo of crack cocaine, that indicates to me that there's a lot more crack cocaine that's being distributed. In any event, that corrobo-

rates the fact that there was a large amount of cocaine being distributed.

In addition, there's small amounts of cocaine that were seized when various persons were arrested. There's small amounts of cocaine that were alleged in Counts 11 and 17 that the court would find the defendant was convicted of.

The court further finds that the tapes, over three or four months of tapes, corroborate the extent of this organization, the extent of the cocaine being distributed, which would support the conservative figures that I have attributed, at least, to Box's testimony that he received from Ilander Willis. And I will find that I credit that Willis supplied this organization with a total of eight kilos.

The court also has looked at the testimony again of Purvis and McGhee as to the amounts that they said that they were selling through the summer of 1992 and up through 1993 until the arrests. Although Purvis stopped at the end of January of 1993, McGhee was selling up to the end. In fact, he was even caught with some at the end when he was arrested. And there's surveillances that show the amounts -- that show that the spots out on the West End were the hub of activity of cocaine sales.

The court further finds that various baggies were seized in homes and then the large quantity of baggies, 40,000, that were found in a residence shortly after July 28th and which Box testified were to be used to store the sales of cocaine, cocaine base.

The court also recalls the testimony that many of the members of the leadership group were found with pagers

and were found with cellular phones, that there were records made of phone calls among the members of the organization, all this showing that it was a highly organized group. Therefore, the conclusion is that the leadership knew what was going on, could reasonably foresee this, and the amounts that I have attributed to Ilander Willis of a total of eight kilos is certainly a conservative estimate, but Box testifies it's either eight or nine kilos, and the testimony certainly would support at least the low end that I have attributed, all this corroborating evidence that I've just stated.

The court will find that of that, I will attribute four kilos to crack, four kilos to cocaine, and reason for making that 50/50 split is the same as I did earlier, that they were selling both, and even though Box testified a majority was crack, I'm being conservative to state that it's 50/50.

The court has listened to the arguments of the government that I ought to attribute more on the basis of Box's testimony that Sockwell and Pierson might have provided more cocaine to the group. I've considered that, but I have to go by proofs, and he didn't specify amounts, and, as far as I'm concerned, I'm not going to attribute any more to them. It may be that Sockwell and Pierson did supply more, but I don't find the amounts have been shown by a preponderance of the evidence.

The court is not going to attribute anything to the Sanches transaction. I'm unclear as to what that's all about. I have an obvious suspicion, but here's a paid witness that the court has doubt whether that type of evidence is very

credible, and, therefore, I'm not going to credit any amounts, as far as he is concerned.

The court has made these findings of fact. The court is well aware that it could perhaps attribute more on the basis of the testimony it heard, but I've discounted that. I've discounted it for the reasons that I've said. I've discounted it also because at the time these people are all arrested, there weren't large quantities found; although, it's my opinion that it got distributed or hidden, and, therefore, that's why it wasn't found. The court, therefore, has made these findings of fact.

In my calculations, I therefore conclude that the defendant, because he was a member of the leadership, reasonably could foresee the purchases that I've talked about and the distribution which corroborates the purchases and that these were all in furtherance of the stated conspiracy to distribute crack and cocaine in this community. I attribute the following then. Nine and a half kilos of crack and thirteen and a half kilos of cocaine.

I have done mathematics on that, and that would compute out to be at a level 40 because the cocaine would translate into 2700 kilos of marijuana, and the crack cocaine of nine and a half kilos would translate into 190,000 kilos of marijuana, totaling approximately -- those two totals, adding those up, would be 192,700, and that puts you between 100,000 and 300,000 kilos of marijuana, which, again, I've said has been translated because the Guidelines require that. And the court would then conclude that 100,000 kilos, but

less than 300,000 kilos of marijuana, arrives at a level 40. That is the level that I arrive at, as far as the amounts.

The court further must make a determination on the other issue, and that is the leadership, which we've already discussed in great length. I would simply say this, that I must determine whether the defendant played an aggravating role or a leadership role under 3B1.1(b) or whether he should be given a downward departure under 3B1.2 as a minimal role or minor role.

The court has already indicated the reasons why I have found him to be a leader or a part of the group that is a leadership group, and, therefore, I find that it's clear in my mind, at least, by a preponderance of the evidence that he is a leader, but I must further determine whether he directed five participants, he being one of those participants, and whether his role was such that he, in directing those participants, gave them orders or got them to join the organization or got them to join the conspiracy.

It's clear, at least I think, that he supervised at some point Purvis, McGhee, and Lockett. That's three people. And the law requires some control by the defendant over a participant. And, therefore, I find it's clear that he supervised those persons. I don't see a clear fourth person in there, but I will find that even though he may not directly -- there may not be proofs that he was active in directing other persons himself, it was otherwise extensive under that section, and that I look at the numbers of participants in the offense, and you look to all persons who were involved during the course of the conspiracy, and the defendant must

direct at least one person, and here I find that he directed at least Lockett, Purvis, and McGhee at various times.

But, secondly, that the organization or the Mob directed a great number of persons, and these were persons that were supervised by the group, that is, decisions made by the group to hire these people to work and direct them, that this was reasonably foreseeable by the defendant. Those persons again include Purvis, McGhee, Evans, Lockett, at one point Evans. I think the Defendant Evans got in the group because of his connection with and friendship with the defendant, but I also think that there's evidence that Jackpot played a role, Tonka, Pookie, Joe Tidwell, Donnell Webb, who is the stepbrother of the defendant, Vince Edwards, Dexter Hammond, and there are others in the record, numerous others, that I haven't got at my fingertips, but they're in the record, who Don Box, Purvis, and McGhee all said were working for the organization. I credit their testimony. And there are unnamed persons that are working for the organization.

So, under the otherwise extensive, this organization was extensive. The defendant supervised at least one other person, and all those other people were also supervised by the group. Therefore, I deny the motion for a reduction in the level under 3B1.2 asked for by the defense and find I agree with the PSI report that he played an aggravating role in the offense and is entitled to a four-level increase under 3B1.1(b).

I also should state that I've considered carefully the cases of the Seventh Circuit; although, I haven't cited them.

I have considered the Miller case at 962 F.2d, a case 9 F.3d at 576, and the Poola case at 932 F.2d, and I have these on my desk. It's just that I have not, throughout the course of this, had time to refer to these, but I've taken the principles out of those cases and applied it in my reasoning here.

The court has therefore found that the defendant is at a 44 level, and the remaining issue to be argued is whether he possessed a weapon during the course of this conspiracy.

MR. ZUBA: Judge, I'd like to just make one comment with respect to the leadership role. The Probation Office asked for three levels. The government objected and asked for four. So, you're really not adopting theirs.

THE COURT: I'm sorry. I forgot that they had only had a three level. I have a four level for the reasons that I've stated, and I make that finding.

I'm prepared at this time to listen to arguments as it relates to the weapon. obviously, the defendant is right now at a level that gives me only one option, but I must make findings of fact. It very well may be -- and I say this to both sides -- it may be that the upper court disagrees with my calculations. So, that's why I've made those calculations, so that both sides can take those issues up. That's why I have to make a finding here because if something else is -- if the court sees it a different way, then they can adjust points Sentencing Guidelines so that once I calculate what those Guidelines are, the court must follow the particular Guidelines and impose a sentence which is set in the Guidelines.

I want to again indicate, as I did in one or both of the prior trials, that I don't necessarily agree with the Guide-

lines, that they eliminate the discretion that the court has in pronouncing a sentence, but the Guidelines are such that they not only have taken the discretion from the judge in arriving at a sentence that I might consider appropriate, but they've also legislated that crack cocaine is a hundred times more serious than cocaine. I don't necessarily believe in that, but, in any event, that is the particular determination by the Sentencing Commission.

The court will simply say this, as far as the life imprisonment sentence that is set forth under the Guidelines, there's cases -- Hamlin v. Michigan, the Seventh Circuit case of U.S. v. Masters -- that clearly say that that type of a penalty, based upon the amounts and based upon the differential between crack and cocaine, are constitutional. And in that respect I'm bound by Seventh Circuit law and bound by the United States Supreme Court, and thus a person who has never committed a felony, at least, and who is 22 years old is now facing a life sentence.

The court further will say this, that I'm familiar with actions -- criminal cases in state court, what the various penalties are there for about the same conduct here, and the penalties are not the same. Be that as it may, the federal government has perceived a problem that crack cocaine and cocaine cause in the community, and they pass these laws, and this court is bound to administer the consequences of those laws, even though I face having the obligation to impose a life sentence on someone who hasn't killed anybody, who hasn't got a prior felony record, and who hasn't engaged in any criminal convictions that show me that

he is a person that normally is one who should spend the rest of his life behind bars.

On the other hand, as I said, drug trafficking is an evil that the Congress has addressed, that it's an evil because those who distribute cause harm to the individual who uses it, to that person's family. It causes violence among people who are in the drug trade. The defendant himself has been shot. And the fact that he has not killed anyone yet, it very well may be that had this gone on, he could have been killed or he could have killed somebody else.

I believe that he carried a weapon. Once you carry a weapon, whether it be for protection living out on the West Side or whether it be for protecting your drug traffic -- and here I think it's to protect his drug dealings -- he's going to kill somebody, or somebody's going to kill him. We already have 28 deaths in this community, and a large part of those deaths this year are because of shootings in the West End.

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
	)	
Plaintiff,	)	Rockford, Illinois
	)	Thursday,
v.	)	October 13, 1994
	)	11:00 o'clock a.m.
HELEN FORT,	)	
	)	
Defendant.	)	

VOLUME III
EXCERPTS FROM
TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

For the Government:	HON. JAMES B. BURNS United States Attorney (211 South Court Street, Rockford, Illinois 61101) by MR. JAMES T. ZUBA Assistant U.S. Attorney
For the Defendant Helen Fort:	MR. MARK A. BYRD (308 West State Street, Suite 120, Rockford, Illinois 61104)
Also Present:	MS. TERESA BROWN Probation Department
Court Reporter:	Mart T. Lindbloom 211 South Court Street Rockford, Illinois 61101 (815) 987-4486

* * * * * *

you may argue the matter as it relates to any quantities that can be attributable to Helen Fort during the May through July 1993 period.

MR. ZUBA: Your Honor, there is testimony in the record, testimony from Don Box, with respect to quantities that were distributed by the Mob during the May 1993 through July 28, 1993, time period. He testified that based on his involvement he believed that between approximately two and three kilograms of cocaine per month were distributed by the Mob during that time period and that the majority of that was crack. If you consider simply two kilograms, which would be two-thirds of that being crack, then you've got six kilograms of crack as an estimate during that time period.

I think if you consider where Helen Fort came from before she arrives in the 193 time period, it's enlightening and revealing as to the scope of her agreement with these other coconspirators and the foreseeability to her. Obviously, her 1991 involvement indicates that she knew what this organization was about, that they obtained kilogram quantities of cocaine, that they packaged it into packs, and that it was sold at the street level. She was an integral member of the organization at that time.

She left during most of '92 and returned during the spring of '93. Many of the same people were involved. Most of the same people were involved. There were additional people

* * * * * *

taking an active role. And, yes, the government may wish they had called him, but the bottom line is they didn't, and it is their burden of proof to establish this by a preponderance of the evidence.

And the only testimony from Box, Horton, and McGhee is that Helen Fort was not dealing crack cocaine during that period of time. In light of that versus transcripts that are without context and only demonstrate knowledge and not action, your Honor, it simply doesn't rise to the level of preponderance. Thank you.

THE COURT: The court will take a five-minute recess. I want to collect my thoughts, and then I will proceed with making my findings, and then we'll proceed on. Five-minute recess.

(Brief recess.)

THE COURT: The court has carefully considered the arguments that have been made by counsel, as well as all the evidence at the sentencing hearing and in the trial transcripts, as it relates to the issue before me. The issue before me is to determine what quantities, if any, of cocaine or cocaine base should be attributable to Helen Fort under relevant conduct factors under 1B1.3, which requires that these quantities must be foreseeable -- quantities of other persons must be reasonably foreseeable acts of others in furtherance of the Jointly undertaken criminal activity.

The court has considered the testimony carefully, and, first of all, I make the finding that as to her joining the

conspiracy for illegal drug purposes, those who were in the conspiracy, Donald Box and Randy Horton, neither testified that she joined the conspiracy for the purpose of that illegal activity. In addition, Reginald Purvis and Decarles McGhee, who were both runners in the organization, say that -- they testified that they did not see her conducting any part of the operations.

On the other hand, there are tapes that I have said yesterday and restate today show that she became involved again in the conspiracy. She knew of the existence of the conspiracy, which is obvious from the tapes, and she became a member at some point for some limited purposes, and I made that finding.

The next finding is, well, what quantities must be attributable to her. The government does have the burden of proof, and they must establish that she had a substantial commitment to the sale of cocaine and cocaine base. The only basis that I can see that links her are some isolated telephone conversations that do indicate to me that she had knowledge of what was going on at certain periods of time, that she assisted the conspiracy at certain periods of time. That's clear. But the next determination is that the government wants me to attribute six kilograms of cocaine base to her. I cannot do that. It has not been shown by a preponderance of the evidence that she knew -- reasonably foresaw that that amount was being distributed by the group. I may suspect it. I may believe it. But it simply has not been proved by these isolated telephone conversations.

There's no evidence of any sales by her except the 41 grams of cocaine base, which I have included. But to attribute the amount as to other persons in this conspiracy, I cannot do it under the evidence that's before me. Therefore, the level that I had reached yesterday is the level that shall be attributed to her. It's a 32 level, base level, for the amount of cocaine and crack cocaine.

In addition to that -- I might say that my ruling in this case, not only would it be difficult for me to compute the amount, other than the 41 grams, but it would be pure speculation as to whether it's cocaine or crack cocaine. Box's general testimony was that, well, it was mostly crack cocaine. The testimony of McGhee is, well, we sold both cocaine and crack cocaine. So, those are difficult matters that I may have to face in another sentencing, but as to this sentencing, I have ruled, and she arrives at a 32 level, and she has a six-level enhancement for the possession of the weapon and for the leadership role that she played in the conspiracy back in 1991.

Therefore, at this point in time, the court has calculated the -- under the Guidelines, this court must sentence her from 262 months to 327 months, unless I would award a downward departure. That is your next motion; is that correct?

MR. BYRD: That is correct, your Honor.

THE COURT: Do you wish to address that now, or do you wish to rest on the written presentation?

MR. BYRD: Your Honor, no, I would wish to address that now because my motion is pertinent to the calculation

under the various levels under the Guideline range and does not take into account evidence that I would be presenting afterward for trying to convince the court to sentence her at the lower end of the applicable range. Therefore, I would like to proceed on that motion.

THE COURT: All right. Do you have any testimony, or is it argument?

MR. BYRD: It's just argument.

THE COURT: You may approach the podium and argue.

MR. BYRD: Your Honor, I have made a motion pursuant to 18 U.S.C. 3553(b) and United States Sentencing Guideline 5K2.0 asking the court to consider a downward departure for what is essentially, under the Guideline and the applicable statute, circumstances of an aggravating or mitigating -- in this case I'm arguing mitigating circumstances to a kind or degree not adequately taken into consideration by the . . .